IN THE

Supreme Court of the United States

OCTOBER TERM 1971

NO. 71-1342

FREDERICK P. ADAMS, *Petitioner*

versus

HARRIS COUNTY, TEXAS, *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Supreme Court Of The United States:

Harris County, Texas respectfully requests The Honorable Supreme Court to decline Frederick P. Adams' request for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTION PRESENTED

Does the District Court for the Southern District of Texas have jurisdiction in this cause, either by application of the traditional principles of admiralty law or by virtue of an application of the Admiralty Extension Act?

STATEMENT OF THE CASE

This cause was filed in Admiralty by Frederick P. Adams against Harris County, Texas. *Mr. Adams has also filed a suit in the District Court of Harris County, Texas, which is pending.* Adams seeks to recover damages for bodily injuries sustained when a motorcycle, which he was operating, collided with a safety barricade arm on a drawbridge over Cedar Bayou in Chambers County. The bridge is also located within the boundaries of the City of Baytown, Texas, and the western half of the bridge is in Harris County. The safety barricade arm is of the type often seen at railroad crossings, and was raised and lowered across the roadway. A Harris County employee was manning the mechanisms at the time of Mr. Adams' collision with the safety barricade arm. The safety barricade arm is not attached to the draw portion of the bridge, nor has it ever been alleged that such is the case. It is alleged by the Plaintiff that at the time of Mr. Adams' collision with the safety barricade arm, the drawbridge mechanism was being raised, and that the safety barricade arm had been lowered to permit the passage of a pleasure boat through the obstructing bridge area. The Petitioner has conceded that he was injured by the barricade arm as he *approached* the draw area of the bridge. (See Respondent-Appellee's Supplemental Brief, Page 3, presented to the Fifth Circuit and also Claimant's Petition for Writ of Certiorari, Page 4).

STATEMENT OF POLICY

Harris County, Texas will continue to abide by the appropriate ruling of the Honorable Fifth Circuit Court of Appeals, wherein it was ordered that "There is no place in this appeal for acrimony or comments bearing on personalities." (Order Granting Permission To Appeal, July 8, 1971, Page 2). For the convenience of The Honorable Supreme Court, Harris County, Texas will, insofar as possible, follow the format adopted by the Claimant in his Petition For Writ Of Certiorari.

REASONS FOR DENYING THE WRIT

We note at the outset that the Petitioner has finally and properly foregone his "maritime connection test" argument that was stressed, and relied on so heavily by said party and The Honorable Trial Court in briefs and oral arguments. The Petitioner continues to rely on his other contrived arguments, and he has devised additional ones as well. Claimant now advances and continues to promote the following arguments:

(1) The plaintiff was injured by the movement of the draw portion of the bridge, and the draw portion of the bridge must be classified as an aid to navigation. Under traditional rules of admiralty, not considering the Admiralty Extension Act, aids to navigation have not been encompassed within the land extension doctrine. Therefore, under the locality test as laid down in The Plymouth, 3 Wall. 20, 70 U.S. 20 (1866), the tort alleged is cognizable in admiralty.

(2) Even if the draw portion of the bridge is not an aid to navigation, the case involves a maritime tort because under the terms of the Admiralty Extension Act (62 Stat. 496, 46 U.S. Code, sec. 740,

1948 A.M.C. 1060) the injuries were "caused by a vessel" since the bridge was allegedly opening for a vessel at the time of collision.

(3) The Honorable Fifth Circuit Court of Appeals allegedly utilized a procedural test improperly. .

(4) The Claimant should be given favored treatment such as was allowed the plaintiff in Chevron Oil Co. v. Huson, 92 S.Ct. 349 (1971).

It has been fervently argued by the plaintiff in this cause that the movable portion of the bridge over Cedar Bayou must be classified by the law as an "aid to navigation." The argument goes that if this technical classification is correct, then admiralty jurisdiction attaches in the cause under traditional principles of maritime law. Such a stance is untenable. The Plaintiff's Original Complaint alleges that ". . . Frederick P. Adams was caused to be struck and knocked about by the operation of the drawbridge . . ." Claimant, since filing his original complaint in the Trial Court, has, in effect, stipulated that he was struck by the guard arm and not the drawbridge. In Petitioner's Statement of the Case, contained in his Petition for Writ of Certiorari, he says "As Adams *approached* the draw section of the bridge . . . The drawbridge keeper opened the draw and *dropped the barricade* on Adams . . .". (Page 4). This same stipulation was made before the Fifth Circuit in Claimant's Respondent-Appellee's Supplement Brief. (Page 3). This stipulation is mentioned only in passing, and it is Harris County's position that it does not matter in the least, for the purposes of these proceedings, whether Mr. Adams struck the bridge or the guard arm, or whether they struck him.

A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and con-

venience to commerce upon land. *Clement v. Metropolitan West Side El. Ry. Co.*, 123 Fed. Reporter 271 (U.S. Circuit Ct. of App., 7th Cir. 1903). A bridge can be made less of an obstruction to navigation by making a portion of it movable to permit vessels to pass through, but a bridge so constructed can never be classified as an "aid to navigation" merely because this concession is made to water commerce. For purposes of analogy, it should be noted that the United States Supreme Court has held that artificial island drilling rigs are not aids to navigation. *Rodrique, et al v. Aetna Casualty and Surety Co. et al*, (U.S. Sup. Ct. 1969). Offshore rigs, like bridges, are obstructions to navigation. Federal regulations require that beacon lights be placed on the rigs to warn of such obstruction at night. There is no doubt that these beacon lights cause the rigs to be less obstructive to navigation than they would otherwise be, and in fact often cause the platforms to become lighted markers for nighttime navigation. However, the placing of the beacons cannot change a rig's basic status as an obstruction to navigation to that of a "navigational aid." The term "navigation aids" has traditionally been used to refer to buoys of all types and lighthouses which are placed and constructed for the *sole purpose* of aiding navigation in the water.

The United States Supreme Court has ruled that a drawbridge, and specifically the *movable or draw portion* of a drawbridge, are extensions of the land and not AIDS TO NAVIGATION in the maritime sense. In the sister decisions of *Cleveland Terminal & Valley Railroad Co. v. Cleveland Steamship Co.*, 208 U.S. 316, 28 S.Ct. 416 (1908) and *Duluth & Superior Bridge Co. v. Steamer "Troy"*, 208 U.S. 321, 28 S.Ct. 418 (1908), which should be read together, the U. S. Supreme Court said, as follows:

"On the hearing the district court sustained the exception and dismissed the libel 'on the ground that, although the property injured by said disaster, said dock, said center pier, and said protection piling work, stood in the navigable water of said river, yet it does not appear from the allegations of the libel that any part of said property so injured was either an instrument of or an aid to navigation, for which reason there is no authority for sustaining the jurisdiction of a court of admiralty over the wrong complained of and the cause of action set forth in the libel.' It is unnecessary to cite the numerous cases to the same effect to be found in the books. The rule stated has been accepted generally by bench and bar, and has never been overruled, *though counsel express the hope that it may be because of our decision in the Blackheath* (United States v. Evans) 195 U.S. 361, 49 L.ed. 236, 25 Sup. Ct. Rep. 46. In that case Mr. Justice Brown, in concurring announced the view that the effect of the decision was to overrule what had previously been laid down in the cases we have cited. But the Court held that the opinion was not opposed to the prior adjudications, and, without entering into the elements of distinction between that case and The Plymouth, said: 'It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty,—a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea'.

"The case was a libel in rem against a British vessel for the destruction of a beacon, number 7, Mobile ship channel lights, caused by the alleged negligent running into the beacon by the vessel. The

beacon stood 15 or 20 feet from the channel of Mobile river, or bay, in water 12 or 15 feet deep, and was built on piles driven firmly into the bottom. The damage was to property located in navigable waters, solely an aid to navigation, and maritime in nature, and having no other purpose or function.

"In the present case damage to shore dock, and to bridge, protection piling, and pier, by a vessel being forced against each of them by the vessel proceeded against, as well as damage to shore dock, abutment, protection piling, pier and dock foundation by a wash said to be due to the increased current arising from partial damming of the stream by the three vessels, brought into such position by the alleged fault of the vessel proceeded against, was sought to be recovered. But the bridges, shore docks, protection piling, piers, etc. pertained to the land. *They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such.*

"The proposition contended for is that the jurisdiction of the admiralty court should be extended to 'any claim for damages by any ship,' according to the English statute; but we are not inclined to disturb the rule that has been settled for so many years, because of some supposed convenience.

"Unless we do that, this decree must be affirmed, and it is so ordered."

"TROY"

"Appeal from the District Court of the United States for the Western District of Wisconsin to review a decree dismissing, for want of jurisdiction, a libel in rem against a vessel *for injuries inflicted*

to the draw of a bridge over a navigable stream and to its center pier protection. Affirmed.

"The facts are stated in the opinion.

"The Duluth & Superior Bridge Company owned and operated a bridge between the cities of Duluth, Minnesota, and Superior, Wisconsin, over the St. Louis river,—a navigable stream. *The bridge was equipped with a swinging span, supported to a turntable resting on a base of stone and piles driven into the bottom of the river, leaving a space for the passage of vessels on either side of the supporting structure.* When closed its ends rested upon permanent abutments, forming a passageway over the stream for street cars and foot passengers, *and when opened allowing the passage of the largest lake steamers.*

"On August 11, 1906, *the merchant steamer Troy, inbound, struck the center pier protection and glanced into the draw of the bridge, inflicting heavy damage.* The bridge company filed a libel against the Troy in the district court for the western district of Wisconsin, in admiralty, claiming large damages. The Western Transit Company, owner of the Troy, filed exceptions to the libel, as follows:

'1st. That it appears from the averments of the libel that the bridge alleged to have been injured was a structure on land, for purposes of land travel and convenience exclusively, *not erected, maintained, or operated in any sense or in any degree in aid of navigation, but, on the contrary, an obstruction and impediment to the navigation of a public navigable water channel and highway,* a part of the public waters of the United States, then and there navigable to ships engaged in commerce and navigation.

'2nd. That whatever of damage came to the bridge occurred on land, and no part of the same occurred or was suffered on water in place or man-

ner within the jurisdiction of an admiralty court of the United States.

'3rd. That the claim of damage propounded in the libel fails to show a case within the admiralty jurisdiction of this honorable court, according to the grant of such jurisdiction in the Constitution of the United States and the course and practice in admiralty courts of the United States.'

"The court sustained the exceptions and dismissed the libel with costs, whereupon the case was brought by appeal to this court, the question of jurisdiction being certified.

"*The Cleveland Terminal & Valley R. Co. v. Cleveland S.S. Co.* [just cited] 208 U.S. 316, 52 L.ed.____, 28 Sup. Ct. Rep. 414, involved substantially the same questions of jurisdiction that are involved in this case. There the steamer Reis collided with the center protection of a bridge located in the navigable channel of the Cuyahoga river and injured it, and, at the same time, the abutment or shore end of the bridge, and the wharf or dock in the vicinity. In that case the bridge itself was not injured, *while in this case the center protection and bridge were both injured.* The views we have expressed in that case must govern the disposition of this case, and the decree is affirmed." (Emphasis added)

In *The Steel Ranger,* 62 Fed. Sup. 605 (S.D. New York, 1945) the Court discussed the criteria for determining whether or not a specific structure is an "aid to navigation in the maritime sense." The Court said as follows:

"The question here presented is this: Was the injured thing—the magnetic cable, its coil and appurtenances—an instrument of navigation or an aid to navigation and maritime in nature having no

other purpose or function? On the answer to that question depends the answer to the basic question raised by respondent's motion: Does the libel state a maritime tort over which the District Court has jurisdiction as a court of admiralty? *Cleveland Terminal R.R. v. Steamship Co.*, 208 U.S. 316, at page 320, 28 S.Ct. 414, 52 L.Ed. 508, 13 Ann. Cas. 1215.

"The fact that the tubes were imbedded in the channel bottom or that the control station was built on pilings, so that there was thus an 'attachment to the soil' of the river bottom, would not be 'a peremptory bar' to admiralty jurisdiction if *'the injured thing was an instrument of navigation, and no part of the shore, but surrounded on every side by water, a mere point projecting from the sea.'* The Blackheath, 195 U.S. 361, at page 365, 25 S.Ct. 46, at page 47, 49 L.Ed. 236, opinion by Mr. Justice Holmes.

"[2] In commenting on the Blackheath case Chief Justice Fuller in *Cleveland Terminal R.R. v. Steamship Co.*, supra, [208 U.S. 316, 28 S.Ct. 416] stated that in the Blackheath case 'The damage was to property located in navigable waters, *solely an aid to navigation, and maritime in nature, and having no other purpose or function.*' In the Cleveland R.R. Case *the damage was caused by vessels adrift coming into contact with a shore dock, a bridge with a swinging span, an abutment piling and a pier.* The court stated that *'None of these structures were aides to navigation in the maritime sense, but extensions of the shore and aides to commerce on land as such.'* In the Raithmore, 241 U.S. 166, 36 S.Ct. 514, 516, 60 L.Ed. 937, Chief Justice Hughes applied the doctrine of the Blackheath case to a claim for damages caused by a vessel colliding with an unfinished beacon, in the course of construction in navigable waters, which was 'simply to serve as an aid to navigation' but not yet in use as such. In the present case the

fact that the magnetic field installation had not been entirely connected and in operation at the time of the accident would not be a bar, if admiralty jurisdiction otherwise existed.

"The question presented on the motion before me involve those two possible uses and also a third, the alleged availability of the magnetic channel range as an aid to vessels navigating the channel in a fog. But the latter is only an incidental use. The primary purpose for which the apparatus had been designed and installed was to test a ship's degaussing apparatus. That I hold should not be classified as 'an aid to navigation in the maritime sense,' under the ruling of the United States Supreme Court." (Emphasis added)

Much more recently, of course, the Fifth Circuit Court of Appeals in *Cookmeyer v. La. Dept. of Hwys.*, 309 F. Supp. 881, 1970 A.M.C. 584, held that:

"Benedict's treatise considers purpose to be determinative of the nature of a structure . . .

"The primary purpose of the pontoon bridge was to serve as a span connecting North and South shores of the Mississippi River Gulf Outlet, over which vehicular traffic might pass, pending completion of a high level bridge at an adjacent site. It was not intended to ply the navigable waters of the United States, carrying goods and passengers in commerce. *When the pontoons were turned on their pivots to allow water traffic to pass, they were performing a function ancillary to the primary purpose of bridging the distance between the two shores.* At such times, it should be noted, the pontoons remained attached to the permanent pivot piling structure, and carried not passengers or cargo in navigation. *In the light of the function or mission of this special structure,*

> *the assembly was a bridge and not a barge.* It functioned as a bridge, and was moved through the water only when that function yielded of necessity to the requirements of the Gulf Outlet's water traffic." (Emphasis added)

The U. S. Supreme Court properly refused twice to hear an appeal of *Cookmeyer.*

Plaintiff's Original Complaint says that "Frederick P. Adams' injury *was clearly and directly related to maritime commerce or navigation* for the reason that maritime commerce and navigation was the reason that the bridge was being operated, causing the severe injuries to Frederick P. Adams." (Emphasis added). The Extension of Admiralty Jurisdiction Act (62 Stat. 496, 46 U.S. Code. Sec. 740, 1948 A.M.C. 1060) relied upon so heavily to date by the appellee, reads in pertinent part, as follows:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by a vessel* on navigable water, notwithstanding that such damage or injury be done or consummated on land." (Emphasis added)

The act does not extend admiralty jurisdiction to situations where the acts complained of were committed on land and the injuries were sustained on land. In *Nacirema Operating Co. v. Johnson, et al,* (90 Sup. Ct. 347, 396 U.S. 212, 1969), the United States Supreme Court, when speaking of the Extension of Admiralty Act, said:

> "By its very choice of language, the Act reinforces the conclusion that Congress was well aware of the distinction between land injuries and water injuries and that when it limited recovery to injuries on

navigable waters, it did not mean injuries on land. The Act no doubt extended the admiralty tort jurisdiction to *ship-caused* injuries on a pier . . .

"The [Admiralty] Extension Act was passed to remedy the completely different problem which arose from the fact that parties aggrieved by injuries done by ships to bridges, docks, and the like could not get into admiralty at all." (Emphasis added)

Harris County thinks it worthy of note that Frederick Adams' Original Complaint, which has never been amended, does not even track the language of the Admiralty Extension Act. That is, the Plaintiff never alleged in his Original Complaint that the injuries complained of were "caused by a vessel on navigable waters." The best the Plaintiff could do was to allege a virtually nonexistent "maritime connection" as quoted above. The Extension Act has had the effect of permitting some claimants to maintain an otherwise unavailable action in admiralty as set forth in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 1963 A.M.C. 1649 (1962), but in such cases the injuries complained of were clearly *proximately caused* by a vessel or a vessel's crew. In *Gutierrez*, the result of the shipowner's tort was felt ashore and admiralty jurisdiction clearly attached.

A recent case involving an injury sustained upon an "aid to navigation" is *Clifford Gowdy v. United States of America*, (412 Fed. 2d 525, 1969 A.M.C. 1676, 6th Circ., Cert. den.). In that case the claimant electrician sued the United States after falling from the roof of a lighthouse while performing tasks under a contract with the Coast Guard. The lighthouse, an aid to navigation, was located upon a jetty or breakwater. The District Court held that there was jurisdiction in admiralty since

lighthouses are not encompassed within the land extension doctrine and the breakwater involved was readily distinguishable from a wharf or a pier. The Circuit Court, quoting from *Chapman v. City of Grosse Pointe Farms,* (1968 A.M.C. 386, 385 F.2d 862, 6 Cir. 1967), reversed the District Court saying that no maritime status or connection was involved and restated the rule as follows:

> *"While the locality test alone should properly be used to exclude from admiralty courts those cases in which the tort giving rise to the lawsuit occurred on land rather than on some navigable body of water,* it is here determined that jurisdiction may not be based solely on the locality criterion." (Emphasis added)

The Court went on to say that the application of maritime law in the cause would not further the goal of uniformity in the area of maritime commerce, thus stating one more cogent rule or test to be used in such borderline cases in determining the question of jurisdiction.

In *Bible v. Chevron Oil Co., et al,* (308 F. Supp. 312; 1970 A.M.C. 875; E.D. La. 1969), the Court homed in on the locality issue in determining admiralty jurisdiction. In that case the claimant was working on an off-shore oil rig and fell from the platform into the water. The injuries were received before the plaintiff struck the water. Judge Rubin stated well the rule that the locality test is applied by determining where the last event to make the actor liable took place, i.e., where the harmful force takes effect upon the claimant's body. The Judge went on to rule that the place of final aggravation is not controlling. So the rule is restated that if the injuries complained of were not caused by a vessel in navigable waters, then the locality

rule is controlling in a case such as the one at hand. See also *La Lande v. Gulf Oil Corp.*, (317 F. Supp. 692, 696; W.D. La. 1970).

This cause is not of the troublesome variety involving an injured seaman, vicarious seaman or longshoreman. The Fifth Circuit's opinion in Harris County's favor cannot have the effect of watering down these workers' long fought for rights to be provided with a seaworthy vessel or a safe place in which to work. We feel compelled to speak of this phase of admiralty law only because appellee has tended to rely on a line of cases involving seaman's rights to advance his position in the situation at hand.

There is no doubt that special laws such as the Jones Act, 46 U.S.C.A. Section 688, have extended admiralty jurisdiction. In *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 488 (1943) and *Swanson v. Marra Bros., Inc.*, 66 S.Ct. 869; the U. S. Supreme Court laid any arguments to the contrary to rest. The same Court, however, has made it abundantly clear, that these special acts cannot apply unless the requisite *maritime status or connection* between the parties exist. "The jurisdiction of admiralty over a cause of action under The Jones Act by a seaman injured on shore while engaged in his duties as a seaman, depends, *not on the place where the injury is inflicted,* but on the nature of the seaman's service, *his status as a member of the vessel, and his relationship as such to the vessel and its operation on navigable waters.*" (Emphasis added). *Swanson v. Marra Bros.*, (supra). No one disputes that these special acts have extended admiralty jurisdiction in the limited sphere of injuries-on-the-job in a maritime setting, but these statutes, and all cases connected therewith, are irrelevant to the plaintiff's case. *Nacirema* held that the Admiralty Exten-

sion Act did not extend the coverage of the Longshoreman's Act. See *Evans v. La. Dept. of Hwys.*, 430 Fed. (2d series) 1280 U.S. Ct. of Appeals, Fifth Cir. Aug. 1970, as a case involving an injury on a drawbridge by a state employee asserting status as a vicarious seaman.

Three recent cases act in unison to demolish the Plaintiff's stance in this matter. In the *Rodrique* case (supra), Mr. Justice White said, while speaking for a unanimous Court, as follows:

> "Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, *bridges*, or even ramps or railways running into the Sea. To the extent that it has been applied to fixed structures completely surrounded by water, this has usually involved collision with a ship and has been explained by the use of the structure *solely or principally* as a navigational aid. But when the damage is *caused by a vessel* admitted in admiralty jurisdiction, the Admiralty Extension Act would now make available the admiralty remedy in any event.
>
> *"The accidents in question here involved no collision with a vessel, and the structure was not a navigational aid.* It was an island, albeit an artificial one, and the accidents *had no connection with the ordinary stuff of admiralty than do accidents on piers."* (Emphasis added)

This wording, coupled with the reasoning in the *Gutierrez* case (supra) forecloses the plaintiff's argument that relief for a land-based tort may be sought in admiralty *where, as here, there exists only the most gossamer, tenuous and evanescent causal connection between a vessel or its crew and the land-based tort.*

It is defendant's view that the causal relationship between a vessel and/or its crew and the land based tort must be clear and overpowering before admiralty jurisdiction will attach. The U. S. Supreme Court, as above quoted, has indicated that there must be an impact, or at least a transfer of energy emanating from a vessel's motive force (such as a vessel's wake) before admiralty jurisdiction will exist *in a case such as the one at hand.* It is Harris County's view, though no Court to date has stated the law in exactly this manner, that this Honorable Court should apply the following rule:

> When there is no maritime status or connection between the parties to the suit as contemplated by special remedial laws such as the Jones Act and the Harbor Workers and Longshoremens Act, and if the injuries complained of were not *directly caused* by the misconduct and/or the impact of a vessel on navigable waters or the misconduct of the crew of such a vessel, then the locality-of-the-injury test is controlling upon the question of jurisdiction in admiralty.

The Honrable Fifth Circuit Court of Appeals isolated the issue exceptionally well in its opinion involving the situation at hand, when it reasoned as follows:

> "In this case we have navigable water and we have a vessel, albeit a light pleasure boat. The question, then, is: Did the vessel cause the injuries to the motorcyclist on the bridge? The vessel was simply approaching the bridge, as any vessel in those waters had a right to do. There is no showing that it was negligent in any respect. *It is not charged with a tort of any kind. It had no control; could exercise none, and attempted to exercise none over the manner in*

which the bridge keeper performed his duties. As mentioned in Rodrique and in Nacirema, supra, there was no physical contact between the pleasure boat and the bridge. There was no damage to the bridge. There was no physical contact between the boat and the motorcycle. The District Court stated in its opinion, 316 F. Supp. at 940, that the bridge keeper caused the bridge to begin to open, which, in turn, caused the barricade to drop, without any indication from the vessel that it was necessary to do so. The inescapable conclusion is that the dropping of the barricade was solely the act of the bridge keeper and no act of the vessel proximately caused his negligence, if there was any.

"It inexorably follows that the injuries complained of were in no way caused by a vessel on navigable water. Jurisdiction is not saved by the Admiralty Extension Act." (Emphasis added)

This quotation is the heart of the Court's opinion. Observe that the Court has presumed that all of Frederick Adams' allegations are true, but the inexorable conclusion follows that the injuries were not "caused by a vessel on navigable waters." As stated previously, the Plaintiff did not even allege in his Complaint that the vessel caused the injuries complained of. He only alleged an evanescent maritime connection.

The Claimant finds fault with the Fifth Circuit's discussion of various conclusions drawn by the Honorable Trial Judge in this case. It is clear that the Fifth Circuit did not base its conclusions upon unwarranted assumptions made by that Court. The Honorable Trial Judge chose to align himself completely with the Claimant's cause, almost to the point of becoming an advocate for Claimant. It is only reasonable, therefore, that the Fifth Circuit

discussed the Court's conclusions, though such was not essential to the Circuit Court's decision. Furthermore, please remember that the Trial Court is the trier of facts in maritime cases, and his conclusions would bear far more weight under these circumstances than a case that would eventually be tried before a jury. For these reasons, no procedural error was committed by the Honorable Fifth Circuit Court of Appeals.

The second and third knells were sounded for Plaintiff's stand in this matter by the Fifth Circuit Court of Appeals in *Cookmeyer* (sup. a) and This Honorable Supreme Court in *Victory Carriers, Inc., et al v. Bill Law,* 92 S.Ct. 418 (Dec. 13, 1971).

Eugene N. Cookmeyer, like Frederick P. Adams, was a motorcyclist. He was crossing a pontoon bridge constructed for the most part of old barges, when he struck a metal apron on the bridge and was injured. The bridge was so constructed that it could open to allow vessels to pass through, and vessels did pass through on the average of four times per hour. The Claimant insists that the *Cookmeyer* case is not applicable to the situation at hand because in that case the injuries sustained by the claimant were not directly related to the movement of the bridge as it opened to allow vessels to pass through. Respondent maintains that such a contention only asserts a distinction without a significant difference. The point is that The Fifth Circuit Court of Appeals and The U. S. Supreme Court have held in *Cookmeyer, "Cleveland"* and *"Troy"* (all supra) that a pontoon bridge and/or a movable bridge is, ". . . in fact and in purpose a bridge, and is, as such, an extension of the land, beyond the admiralty jurisdiction of this Court." Petitioner contends that part

of the bridge over Cedar Bayou is a bridge and that the movable portion is an "aid to navigation." *Cookmeyer* and the other cases cited rightfully reasons that *all* portions of a drawbridge, even a floating drawbridge, constitute an extension of the land, and a claimant will not be heard to take the structure apart, a piece at a time, and say "This part is a bridge and that part is vessel and the draw portion is an aid to navigation." This is so because the primary purpose of the Cedar Bayou Bridge was, and is, to span the waters of Cedar Bayou. When the draw portion of the bridge is opened, yielding by necessity to allow water commerce to pass, the bridge is performing a function ancillary to the primary function of the structure. The status of the structure or appliance is determined by the primary purpose of the structure or appliance involved.

Harris County does not wish to be repetitious or presumptuous, but it respectfully maintains that this Honorable Supreme Court may dispose of this matter by declining to grant a writ of Certiorari based upon Judge Boyle's reasoning in *Cookmeyer,* as follows:

> "The accident forming the basis of this suit having taken place on a bridge, this Court [Federal District Court] lacks admiralty jurisdiction under the premise that a bridge or other structure firmly attached to the land is an extension of land and hence not a subject of the maritime jurisdiction of this Court.
>
> "Plaintiff herein is currently pursuing his proper remedy in a state court negligence action."

Only two days after the Fifth Circuit Court of Appeals rendered its opinion in this case now before the Supreme Court, This Honorable Court reversed that Court in

Victory Carriers (supra). *Victory Carriers*, as the case at hand, involved injuries sustained in a maritime setting, where "things about a ship" were not immediately involved. Please note that the "maritime connection" in *Victory Carriers* was overwhelming, whereas in the case now before the Supreme Court, the maritime connection is ephemeral at best. The Supreme Court ruled as follows in *Victory Carriers*:

> "No case in this Court has sustained the application of maritime law to the kind of accident that occurred in *that personal injuries on land are covered, for the most part, by state substantive law while such injuries on navigable water are generally governed by federal maritime law*. These two bodies of law do overlap and interpenetrate in some situations, and the amphibious nature of the longshoreman's occupation creates frequent taxonomic problems. In the present case, however, the typical elements of a maritime cause of action are particluarly attenuated: *respondent Law was not injured by equipment which was part of the ship's usual gear or which was stored on board, the equipment which injuried him was in no way attached to the ship, the fork lift was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gang plank. Affirmance of the decision below would raise a host of new problems as to the standards for and limitation of the applicability of maritime law to accidents on land.* At least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law . . .
>
> "Perhaps such laws provide inadequate benefits, but we are poorly positioned to conclude that they do or for that reason to give special remedies to longshoremen when other employees operating forklifts for other employers in perhaps equally hazardous

circumstances are left to the mercies of state law. *Claims like these are best presented in the legislative forum, not here.*

"This is particularly true since extending the constitutional boundaries of the maritime law would not require Congress to make an equivalent extension of the jurisdiction of the federal courts sitting in admiralty. Congress might well prefer not to extend the jurisdiction of the federal courts. On the other hand, if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Articles I and III of the Constitution to enact a suitable solution." (Emphasis added).

Please notice that the facts of *Victory Carriers* presented a much stronger case for the application of maritime law than the one at hand because the plaintiff in *Victory Carriers* was a longshoreman, whose traditional connection with maritime commerce was unquestioned.

Frederick P. Adams is not entitled to the favored treatment allowed the claimant in *Chevron Oil Co. v. Huson*, 92 S.Ct. 349, 386 (12/6/71). Mr. Adams must accept the fact that the law applicable to this cause is, and has always been the same. That is, there is not, and there never has been, a remedy in the Maritime Courts for his claim. Plaintiff's remedy, *if he has one*, and he now admits for his own purposes that he does not have one, is in the District Court of Harris County, Texas, where his *pending lawsuit* lies dormant. The *Huson* concept cannot aid one who has done nothing more than cite inapplicable cases to bolster a thoroughly discredited theory.

Equity is not evoked merely because a claimant has been wrongfully advised that there is a remedy for his problem. If there be cruelty in this case beyond that which

life holds for us all, it is not in the law which must inexorably apply to the allegations, but it is in ill counsel which has begotten hope where there is none, and has promised a right where one has never existed.

Respectfully submitted,

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Filed: May _____, 1972.

CERTIFICATE OF SERVICE

I, ANTHONY D. M. SHEPPARD, one of the attorneys of record for the respondent in this cause, hereby certify that I hand delivered a copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the offices of BROWN, KRONZER, ABRAHAM, WATKINS & STEELY, 500 Houston First Savings Building, Houston, Texas, on May 16, 1972.

Anthony D. M. Sheppard
ANTHONY D. M. SHEPPARD
Assistant County Attorney